Supreme Court, U.S.
FILED

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No._____

# In The Supreme Court of the United States

RUPERT M. POLLARD,
*Petitioner*,

v.

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor,
*Respondents*.

**On Petition for Writ of Certiorari To The U.S. Court of Appeals for the Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Federal abstention doctrine, as it relates to domestic relations matters, in conjunction with the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), as explained and limited in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and *Marshall v. Marshall*, 547 U.S. 293 (2006), justify abstention in a case arising under 28 U.S.C. §2410, which requires only interpretation of previous State court rulings, in light of established State law precedent, and not requiring issuance of a divorce decree or determination *de novo* of the marital status of the parties?

   a) Where there has been a prior State Court decree granting a divorce, which has been reversed by a State Appellate court, does a Federal Court ruling which merely determines the effect of the appellate court ruling as it relates to real property invade the realm of the "domestic relations" exception to Federal jurisdiction?

   b) Where one party is deceased, and there are prior state court rulings in the divorce proceedings between the parties, is *Burford* abstention required or warranted where the Federal Court is merely being asked to rule on an action to quiet title to real estate, and interpret the effect of prior State Court rulings on that issue?

2. Does a Federal Court have the jurisdiction, and the duty to exercise such jurisdiction, to interpret the legal effect of prior State court rulings concerning the marital status of the parties, where such determination is required to render a final judgment in an action under 28 U.S.C. §2410?

## LIST OF PARTIES

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## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, and is included in the Appendix hereto.

## BASIS FOR JURISDICTION IN THIS COURT

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(i) Date the judgment or order sought to be reviewed was entered: November 16, 2009.

(ii) Date of any order respecting rehearing/extension of time: none.

(iii) Rule 12.5 considerations: not applicable.

(iv) Statutory provision conferring jurisdiction: 28 U.S.C. §1254(1).

(v) Rule 29.4 statement: not applicable.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

28 U.S.C. §2410 is included in the Appendix below.

## STATEMENT OF THE CASE

### Course of Proceedings and Disposition in Lower Court

This is a property rights case brought by the Estate of Marie A. Merkel, Respondent, pursuant to 28 U.S.C. §2410 against the United States and R.M. Pollard, Petitioner, to quiet title and determine the various parties' ownership interests in real property against which the Internal Revenue Service had filed Federal tax liens. 2009 U.S. Dist. LEXIS 59016.

The decedent and Pollard had been married in 1964. After Decedent had filed for divorce in 1992, judgments granting the divorce and awarding a division of the marital estate were twice entered and twice reversed by the Dallas Court of Appeals. Decedent died after the second reversal and before a divorce could be granted.

In October 2006, the Wife's Estate filed this suit in U.S. District Court, Northern District of Texas. Both the Estate and Petitioner filed summary judgment motions. The District Court granted Petitioner's

summary judgment motion and determined that no final divorce judgment divided the property and the parties were legally married at the time of Wife's death.

After trial to a Jury on the issue of Pollard's abandonment of his homestead rights, Judgment was entered in Pollard's favor, finding that Pollard had retained his homestead rights. The Estate did not appeal the Jury finding, but only challenged the District Court's determination of the effect of the 1999 Dallas Court of Appeals judgment.

On appeal, the Fifth Circuit Court of Appeals *sua sponte* raised the issue of abstention, and then issued its opinion and Judgment, dismissing the case on abstention grounds.

## STATEMENT OF FACTS

### Parties

Marie A. Merkel, deceased, and Rupert M. Pollard, Petitioner, were married in 1964. Merkel died on October 10, 2004. Her Estate is now the Respondent herein.

### Procedural History

The Internal Revenue Service assessed tax deficiencies against Petitioner for tax years 1993 and 1994 and filed tax liens which among other things created a lien upon the parties' homestead located on

4231 Beverly Drive, Dallas, Texas ("the marital residence"). Decedent filed for divorce in 1992, and a divorce was granted by Judgment entered January 30, 1996 which purported to dissolve the marriage and divide the marital estate.

In 1999, the Dallas Court of Appeals reversed and remanded the 1996 judgment of divorce and property division. On remand, the trial court conducted a jury trial in 2000, and entered an Amended Final Decree in May, 2001.

The Dallas Court of Appeals again reversed the trial court judgment and remanded in 2003, because decedent's attorney should have been disqualified. Decedent's Petition for Review to the Texas Supreme Court was denied in 2004. The Dallas Court of Appeals issued its mandate in May 2004.

Merkel died in 2004 before a final divorce judgment was granted.

Pollard Never Abandoned the Marital Residence

On March 12, 1992, Pollard was ordered by the divorce court to leave the parties' marital residence. From that date to the present, he has always maintained the marital residence as his address for purposes of voter residence and has never established another homestead.

## History of Divorce Proceedings

On January 30, 1996, the divorce court entered the first Judgment of divorce over Pollard's objection. Pollard appealed, and on February 12, 1999, the Dallas Court of Appeals reversed the judgment of divorce and remanded it to the trial court. On May 7, 2001, following a Jury trial, the Amended Final Decree of Divorce was signed, which granted a divorce and ordered a property division. Pollard again appealed, and the Dallas Court of Appeals again reversed the judgment on August 18, 2003. The mandate was issued on May 25, 2004, remanding the divorce proceedings without limitation.

Before any further proceedings could take place in the divorce court, Merkel died on October 10, 2004. Various proceedings took place in the probate court thereafter, including entry of an order finding that Merkel and Pollard were no longer married at the date of decedent's death. Pollard attempted to appeal such decision, but such appeal was dismissed as interlocutory.

## Proceedings in the District Court

The Estate filed this action in District Court in October, 2006, seeking to remove the Federal tax liens filed by the Internal Revenue Service based upon alleged tax deficiencies owed by Pollard. The District Court issued several written opinions, all of which are included in the Appendix, granting in part Pollard's motion for summary judgment, and finding that the

second reversal of the judgment of divorce included a reversal of the granting of divorce as well as property division, meaning that Pollard and Merkel were still married at the time of her death, and that Pollard therefore owned a one-half interest in the marital homestead. 2008 U.S. Dist. LEXIS 57687. After a jury trial on the issue of abandonment of the homestead, the trial court entered judgment. 2009 U.S. Dist. LEXIS 59016.

During the course of the proceedings before the District Court, the Estate raised the "probate exception" to Federal jurisdiction, which the District Court summarily rejected. 2008 U.S. Dist. LEXIS 103589.

Proceedings in the Fifth Circuit Court of Appeals

After judgment was entered in July, 2009, by the District Court, the Estate filed its Notice of Appeal, which was not limited as to issues being appealed. The Court of Appeals *sua sponte* raised the issue of abstention, and, following briefing, entered its order of November 16, 2009, vacating the District Court judgment and dismissing the case.

## ARGUMENT FOR GRANTING THE WRIT

### I.

### THE FEDERAL COURT HERE WAS NOT ASKED TO RENDER A JUDGMENT *DE NOVO* DETERMINING THE MARITAL STATUS OF THE PARTIES, BUT RATHER TO INTERPRET THE LEGAL EFFECT OF PRIOR STATE COURT RULINGS

#### A.

#### Abstention is a narrow exception to the duty of the Federal Courts to exercise their jurisdiction

The Court of Appeals erred in dismissing this case on abstention grounds. The Federal Courts have a "virtually unflagging duty" to exercise their jurisdiction. *Deakins v. Monahan*, 484 U.S. 193, 203 (1988). Federal Courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996), and abstention from decision represents only an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id., quoting Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).

As this Court noted in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in applying the factors to determine whether to abstain, the balance is "heavily weighted in favor of the

exercise of jurisdiction." It is fundamental that, where Federal jurisdiction has been conferred, abstention is the exception rather than the rule. *Louisiana Debating and Literary Assoc. v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir.1995); *Webb v. B.C. Poultry, Inc.*, 174 F.3d 697 (5th Cir.1999).

B.

The *Burford* – domestic relations abstention doctrine does not apply in this case

For well over a century, the Federal Courts have declined to exercise their jurisdiction in diversity jurisdiction cases involving domestic relations, probate, and other issues of State policy. This policy appears to have originated in this Court's decision in *Barber v. Barber*, 62 U.S. 582, 590-591 (1859), continuing with other decisions including *In re Burruss*, 136 U.S. 586, 593-594 (1890), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and *Marshall v. Marshall*, 547 U.S. 293 (2006).

The "domestic relations" exception to Federal jurisdiction is applicable to cases founded on diversity jurisdiction, and does not technically apply to cases predicated on Federal Question jurisdiction, such as this case, which is based upon 28 U.S.C. §2410. Recognizing this fact, the Court of Appeals seized upon certain *dicta* in *Ankenbrandt,* and chose to apply the abstention doctrine of *Burford* .

Under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), abstention is proper "when a case presents difficult

questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." This Court, in *Ankenbrandt*, hypothesized that *Burford* might be applied where "a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." 504 U.S. at 705. It was this statement that was relied upon by the Court of Appeals in dismissing this case.

Despite such hypothetical statement, in its holding in *Ankenbrandt*, this Court limited the domestic relations exception to Federal jurisdiction as follows: "the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." 504 U.S. at 704. (Emphasis added).

More recently, in *Marshall v. Marshall*, 547 U.S. 293 (2006), this Court frankly explained that in *Ankenbrandt*, it had "reined in the 'domestic relations exception'" [to exercise of Federal jurisdiction]. 547 U.S. at 299. This Court then explained at some length both the origin of the "domestic relations" exception, and the fact that in *Ankenbrandt*, it had emphasized that the exception covers "only a narrow range of domestic relations issues." *Id.* at 306-308.

In *Marshall*, this Court was presented with a case in which the Court of Appeals had expansively interpreted the "probate exception" as encompassing all questions which would ordinarily be decided by a

probate court in determining the validity of the decedent's estate planning instrument. *Id.* at 299. This Court noted that jurisdiction was predicated upon a specific grant of Federal Court jurisdiction, 28 U.S.C. §1334, and that the case did not present administration of an estate, probate of a will, or some other purely probate matter. 504 U.S. at 312. Finding that the plaintiff was asserting a widely-recognized state law tort action, this Court reversed the expansive interpretation of the Court of Appeals, and held that the abstention by the Court of Appeals was erroneous.

The combined message that this Court has conveyed in its decisions in *Ankenbrandt*, and *Marshall* is that these judicially created exceptions to Federal jurisdiction shall be narrowly construed, and reserved for the extremely precise cases that directly implicate the policy considerations sought to be protected, and that they will not be expansively interpreted.

This case does not involve a direct adjudication of marital status, nor did it involve any attempt to obtain a divorce decree from a Federal court. In fact, granting a divorce was impossible because Merkel had died in 2004, and therefore a divorce could not be granted by any court.

Instead, based upon specifically created Federal jurisdiction designed to adjudicate issues of title to property on which Federal liens are claimed, this case involved determination of the title issues necessary to resolution of a dispute clearly at the heart of the

intended purpose of the Federal statute at issue. In reaching its decision, the District Court had only to analyze and construe the orders of the State divorce court and the Texas Court of Appeals. *See*, 2008 U.S. Dist. LEXIS 57687.

Had the Court of Appeals in this case heeded the express admonitions of *Ankenbrandt*, and *Marshall*, it would have refused to apply the *Burford* doctrine in such an expansive manner as to dismiss this case.

It has long been the law in the United States that, even though the Federal Courts will not become involved in determining issues such as divorce and alimony, they nevertheless will entertain jurisdiction of actions to enforce such rights which have been determined by the State Courts. *Barber v. Barber*, 62 U.S. 582, 590-591 (1859).

The fundamental concerns underlying the domestic relations exception do not apply in this case. Here, the parties had already been granted a divorce, with accompanying property division, by a State court, and such ruling had been contested on appeal and overturned by the appellate court. While the remanded case was still pending, the Wife had died. As a result, granting of a divorce was an impossibility.

It is not sufficient, in order to invoke abstention, to note that construction of state law will be required. As this Court has noted,

> it has from the first been deemed to be

> the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

*Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943).

Following *Meredith*, the Fifth Circuit Court of Appeals held, in *Sayers v. Forsyth Building Corporation*, 417 F.2d 65, 72-74 (5th Cir.1969), that where a District Court was asked to determine the validity and effect of a state court judgment, abstention was improper, because it was the duty of the Federal Court to interpret state law and apply it. That is precisely what the District Court was called upon to do in this case, and the Court of Appeals erred in refusing to do so.

In *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 589 (5th Cir.1994), the Court of Appeals rejected an argument for application of the *Burford* abstention doctrine based upon alleged interference with the state workers' compensation system, because all that was required was the interpretation of a settlement agreement in light of a Texas statute. The *Trejo* Court of Appeals emphasized that all that was presented was a request to construe a judicial decree involving the very same parties as present in the Federal litigation.

In *Lee v. Hunt*, 431 F.Supp. 371, 377-378 (W.D.La.1977), the plaintiff was seeking a declaration that, as the wife of a decedent, she owned half of the oil and gas property acquired by the decedent. The

District Court there rejected the abstention arguments, holding that neither the probate nor the domestic relations exception to jurisdiction were an issue, and held that the dispute involved a dispute over property ownership, and did not invoke the powers of the court to grant a divorce.

Therefore, a correct analysis of the *Burford*–domestic relations exception to Federal jurisdiction, in light of the guidance of *Ankenbrandt*, and *Marshall*, makes it clear that this case did not conflict with state court primacy in determining policies concerning domestic relations issues, and did not involve issuance of a divorce decree or any other direct involvement in this realm of State interest. Therefore, the abstention ruling of the Court of Appeals must be reversed.

## II.

## APPLICATION OF STATE LAW PRINCIPLES, AND DETERMINATION OF THE LEGAL IMPLICATIONS OF PRIOR STATE LAW DECISIONS, IS NECESSARILY PART OF THE JURISDICTION GRANTED TO FEDERAL COURTS PURSUANT TO 28 U.S.C. §2410

28 U.S.C. §2410 was promulgated for the purpose of determining property ownership rights where there is a Federal tax lien against the property. Analysis of this purpose makes it clear that application of the powers granted by the statute necessarily involves consideration of state law issues.

It is clear that the Federal Courts have jurisdiction of a proceeding to quiet title pursuant to 28 U.S.C. §2410. *United States v. Morrison*, 247 F.2d 285 (5th Cir.1957). Lien priority disputes, and disputes whether or not a lien has been extinguished, or determining the relative priority of liens, are properly brought as quiet title actions. *Progressive Consumers Federal Credit Union v. United States*, 79 F.3d 1228 (1st Cir.1996).

Under 28 U.S.C. §2410, the Federal Courts must recognize and follow State law governing such matters as priorities, procedures for foreclosure, and rights of redemption. *United States v. John Hancock Life Ins. Co.*, 345 U.S. 301, 309 (1960). State notice laws must be observed. *Dupnik v United States,* 848 F.2d 1476 (9th Cir.1988). State law controls determination whether or not there is a discharge of a lien upon real property. *Donovan v United States*, 807 F.Supp. 560 (D.S.D. 1992), *aff'd. sub nom. Donovan v. Farmers Home Administration*, 19 F.3d 1267 (8th Cir.1994). In short, application of the Federal statute inevitably requires interpretation and application of state law principles.

Examples of proper application of 28 U.S.C. §2410 to varied fact situations makes it clear that the Federal courts are obliged to consider state law. In *Buhtz v. Rossler*, 2000 U.S. App. LEXIS 15770, 2000-2 U.S. Tax Cas. ¶50.637 (9th Cir.2000), the Court of Appeals followed California community property law in determining the rights of the spouses to personal property on which a Federal tax lien had been imposed.

Again, in *Smith v. United States*, 254 F.2d 865 (6th Cir.1958), the Court of Appeals held that the United States was properly a party to a state court action to quiet title involving conveyance of real property by taxpayer husband to his wife prior to the filing of a Federal tax lien.

In *In re Estate of Norman L. Johnson*, 836 F.2d 940 (5th Cir.1988), an executor was allowed to proceed in an action under 28 U.S.C. §2410 to subordinate a Federal tax lien properly filed to his claims for estate administration expenses.

In *ContiMortgage Corp. v. United States*, 109 F.Supp.2d 1038, 1044 (D.Minn.2000), the District Court followed state law in determining whether or not equitable subrogation of a claimant would be applied to trump a Federal tax lien.

In *Stone v. United States*, 225 F.Supp. 201, 202 (W.D.Wash.1963), the District Court followed State law governing non-liability of the community estate for the premarriage tax liability of the taxpayer husband.

Even though a Federal Court having jurisdiction under 28 U.S.C. §2410 will refrain from making determinations as to divorce, the appropriate procedure is to make the determinations required under the statute, and to allow the state court to make the rulings regarding the divorce issues. *Rostykus v. Rostykus*, 352 F.Supp. 62 (W.D.Okl.1972).

In this case, for the District Court properly to

decide the quiet title issues concerning whether or not a Federal tax lien could be imposed upon the Beverly property for Pollard's tax liabilities necessarily required a determination of whether or not the parties were still married at the time that the liens were imposed. This did not require the Federal Court to make a decision as to Texas state policy concerning marriage, nor to issue a divorce decree, but simply required the court to determine whether, under applicable Texas state law and under the decisions of the state courts, the parties were still husband and wife at the moment that the wife died. This is precisely what the District Court did. 2008 U.S. Dist. LEXIS 57687. The decision on the merits was squarely within the confines of 28 U.S.C. §2410. The District Court was obliged to exercise its jurisdiction, and did so properly. It was error for the Court of Appeals to dismiss this case on the grounds of abstention.

## CONCLUSION

The Court of Appeals in this case completely ignored the central message that this Court has repeatedly sought to convey, in plain language, in its opinions in *Ankenbrandt*, and *Marshall* that, as stated long ago, in the words penned by Chief Justice Marshall, that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264 (1821), quoted in *Marshall v. Marshall*, 547 U.S. 293, 298-299 (2006). Petitioner respectfully prays that the decision of the Court of Appeals dismissing this

action be reversed, that the decision of the District Court be affirmed, or in the alternative that this cause be remanded for consideration on the merits and the decision of the District Court affirmed, and that Petitioner recover his costs of appeal and general relief.

Respectfully submitted,

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Dated: February 16, 2010

App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10203

[Dated: November 16, 2009]

ESTATE OF MARIE A MERKEL, MATTHEW R POLLARD, Independent Executor, Plaintiff-Appellant

v.

RUPERT M POLLARD, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas USDC 3:06-CV-1891-D

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges. PER CURIAM:

For this appeal, because the only issue raised is a question of Texas divorce law, the linchpin is whether our court should abstain *sua sponte*. VACATED and DISMISSED.*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

Drs. Marie Merkel and Rupert Pollard married in 1964. Twenty-eight years later, Merkel filed for divorce in Dallas, Texas. The divorce proceedings' extended history follows.

A.

After Merkel filed for divorce in 1992, the parties mediated a settlement; and, pursuant to it, the Dallas divorce court entered a decree in 1995, dissolving the marriage and dividing the property. Pollard appealed and filed a *lis pendens* notice, asserting a community interest in the property. On appeal, Pollard contested the property division on several grounds, but stated in his brief that he did *not* contest the dissolution of marriage. The Texas Court of Appeals held the divorce court "erred in entering judgment pursuant to the mediated settlement agreement" and reversed and remanded. *Pollard v. Merkel*, No. 05-96-00795-CV, 1999 WL 72209, at *1 (Tex. App.—Dallas 12 Feb. 1999, no pet.) (not designated for publication).

On remand, the divorce action was tried to a jury; and the Dallas divorce court entered a second divorce decree in 2001. The jury awarded the marital home at issue here (the house) to Merkel.

Pollard again appealed, taking issue with the divorce court's failure to disqualify Merkel's attorney. The Texas Court of Appeals ag in reversed and remanded. *Pollard v. Merkel*, 114 S.W.3d 695 (Tex. App.—Dallas 2003, pet. denied).

In 2004, before the divorce court could act on remand, Merkel died. In 2005, the divorce court dismissed the action for want of prosecution.

B.

After Merkel died, her will was admitted to probate, with her son being appointed executor. Pollard again filed *lis pendens* notices, asserting community and homestead interests in the house. The executor moved the probate court to cancel those notices and order Pollard to execute a request for a tax lien pay-off from the Internal Revenue Service. (The pay-off request was premised on Pollard's having failed to pay his federal income taxes while the divorce proceedings were pending. Therefore, in 1993, 1994, 1995, and 2003, the United States had filed tax-lien notices against any property Pollard owned.)

In 2005, pursuant to the executor's motion, the probate court ordered Pollard to show cause why the *lis pendens* notices should not be cancelled and why he should not be compelled to execute the pay-off request. Subsequently, that court ordered Pollard to execute the latter. Pollard refused to do so and, in October 2005, instead filed another *lis pendens* notice against the house.

That October, Pollard also petitioned the probate court to determine the status of the Merkel and Pollard marriage as of Merkel's death. That court held Merkel and Pollard were divorced when Merkel died. Pollard appealed this ruling; the appellate

court held it was "not a final judgment or an appealable order" and dismissed the appeal. *Pollard v. Pollard*, No. 05-06-00375-CV, 2007 WL 1366040, at *1 (Tex. App.—Dallas 10 May 2007, no pet.). The probate proceedings apparently remain open. *See Estate of Merkel*, No. 05-0375-P3 (Prob. Ct. No. 3, Dallas County, Tex. filed 14 Feb. 2005).

C.

In October 2006, Merkel's estate filed this federal-question action against the United States and Pollard, pursuant to 28 U.S.C. § 2410(a)(1). The estate sought to quiet title to the house and "establish that Pollard has no interest in the . . . House and, therefore, the . . . House is not subject to any federal tax lien issued against Pollard or his property". Pollard counter-claimed, seeking a declaration that he and Merkel were married as of her death and that, accordingly, Pollard owned an undivided one-half interest in the house.

The parties filed cross-motions for summary judgment on whether Merkel and Pollard were married when Merkel died. The estate contended: Merkel and Pollard were finally divorced as of the first divorce decree in 1995 because Pollard only appealed the property division. Pollard maintained: the dissolution of the marriage was not severable from the property division; and, therefore, the divorce was never final. In July 2008, the district court awarded partial summary judgment to Pollard, holding, *inter alia*, he and Merkel were married at her death. *Estate of Merkel v. Pollard*, No. 3:06-CV-

1891-D (N.D. Tex. 29 July 2008).

Accordingly, the action proceeded to trial on whether Pollard had abandoned his homestead interest in the house. In January 2009, a jury returned a verdict for Pollard, finding the estate had failed to prove abandonment.

A final judgment was entered in February 2009. It provided, *inter alia*: Pollard and Merkel were married as of her death; and, Pollard had a one-half community property interest and a homestead interest in the house. *Estate of Merkel v. Pollard*, No. 3:06-CV-1891-D (N.D. Tex. 4 Feb. 2009).

D.

In addition to the above-recounted facts and proceedings found in the record on appeal, we take judicial notice of these *five* actions pending in state court, all of which are related to Merkel and Pollard's divorce. *Pollard ex rel. Estate of Merkel v. Pollard*, No. 05-09-01087-CV (Tex. App.—Dallas filed 10 Sept. 2009) (appeal of probate court's denial of Pollard's motion for accounting); *In re Marriage of Merkel & Pollard*, No. 05-08-01615-CV (Tex. App.—Dallas filed 26 Nov. 2008) (appeal of divorce court's dismissal of divorce proceedings); *Estate of Merkel*, No. 05-0375-P3 (Prob. Ct. No. 3, Dallas County, Tex. filed 14 Feb. 2005) (administration of Merkel's estate); *Pollard v. Pollard ex rel. Estate of Merkel*, No. 05-0375-P3(A) (Prob. Ct. No. 3, Dallas County, Tex. filed 8 Aug. 2005) (petition for declaratory judgment on whether Merkel and

Pollard were divorced at Merkel's death); *Pollard v. Pollard ex rel. Estate of Merkel*, No. 05-0375-P3(B) (Prob. Ct. No. 3, Dallas County, Tex. filed 21 Oct. 2005) (Pollard's unsecured claims against the estate for various personal property).

II.

In this appeal, the estate challenges only that part of the judgment awarded Pollard on the marital status; in short, *not* contested is that part of the judgment concerning the jury verdict (Pollard's not having abandoned his homestead interest in the house). In other words, no relief regarding tax liens, determination of property ownership, the Government's rights as to each side, or similar relief is sought. The United States has not even participated in this appeal. In essence, the *only* result of our ruling on the merits would be a decree of divorce or a declaration of marriage.

Therefore, at issue, as raised by the estate, is only a state-law question, involving an area of special state interest: domestic relations. Accordingly, of immediate concern is whether we should abstain *sua sponte* from deciding this matter. In that regard, we may do so for the first time on appeal. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 588 (5th Cir. 1998) ("[W]e agree . . . that *Burford* abstention may be raised at any time. . . ."); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 255 (5th Cir. 1990) ("Where *Burford*-type abstention is appropriate . . . it can be ordered on appeal even if not raised in the trial court."); *BT Inv.*

*Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.16 (5th Cir. 1977) ("By its nature, the abstention issue is raised either by a defendant or by the court sua sponte.").

A.

For obvious reasons, "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts". *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004) (holding father lacked standing to bring a First Amendment challenge to his daughter's school's policy of reciting the Pledge of Allegiance where father was involved in an underlying custody dispute over the daughter). Along this line, there are two ways in which federal courts may defer to state courts and thereby avoid adjudication of domestic issues.

First, under the domestic-relations exception, federal courts lack jurisdiction to "issue divorce, alimony, and child custody decrees". *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Second, even where the elements of the domestic-relations exception are not precisely met, abstention is nonetheless called for under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), "when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'". *Ankenbrandt*, 504 U.S. at 705–706 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). "Such might well be the case if a federal suit were filed prior to effectuation of a

divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Id.* at 706.

For starters, the domestic-relations exception to federal jurisdiction is not applicable in this *federal-question action* to quiet title. As provided in *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997): "The domestic relations exception obtains from the diversity jurisdiction statute...and therefore it has no application where, as here, there exists an independent basis for federal jurisdiction". *Compare with Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006); *Thompson v. Thompson*, 798 F.2d 1547, 1558 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988). As a result, the principal question at hand is whether, pursuant to *Ankenbrandt*, *Burford* abstention controls.

The *Ankenbrandt* Court considered whether the domestic-relations exception deprived the district court of its diversity jurisdiction over a sexual-abuse tort action by a mother against her ex-husband on behalf of her children or, alternatively, whether abstention was required. *Id.* at 691. The Court held: the domestic-relations exception was not met; and, further, abstention was not required because "the status of the domestic relationship [had] been determined as a matter of state law, and in any event [had] no bearing on the underlying torts alleged". *Id.* at 706.

In contrast, the parties here vigorously dispute the

status of the domestic relationship—the *only issue* raised on appeal. Again, as the *Ankenbrandt* Court noted, abstention might be proper "if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties". *Id.* at 706. That is the situation at hand. (As discussed *supra*, the probate court ruled in 2005 that the parties were divorced at Merkel's death. Due to the nature of those proceedings, however, that decision was not a final judgment and, as such, did not render the issue *res judicata*. Hence, the question was at issue in, and decided by, the district court in 2008, when it granted partial summary judgment to Pollard. *See Medina v. I.N.S.*, 993 F.2d 499, 504 (5th Cir. 1993) (holding *res judicata* requires a final judgment); *Pollard v. Pollard*, No. 05-06-00375-CV, 2007 WL 1366040 (Tex. App.—Dallas 10 May 2007, no pet.) (dismissing Pollard's appeal of probate court's order holding parties divorced at Merkel's death because that order was *not* a final judgment); *see also Estate of Merkel v. Pollard*, No. 3:06-CV-1891-D, slip op. at 3 n.2 (N.D. Tex. 29 July 2008) (citing *In re Ark-La-Tex Timber Co.*, 482 F.3d 319, 330 (5th Cir. 2007)). Therefore, for our purposes, the issue is effectively undetermined by a state court.)

Moreover, whether the parties were divorced as of Merkel's death had bearing on the quiet-title action. Neither party having briefed this issue, it is unclear to what extent Pollard's marital status would affect the house being subject to the Government's liens. It *is* clear, however: if Pollard and Merkel were still

married as of Merkel's death, Pollard was a surviving spouse under the Texas constitution; and, barring abandonment, he would be entitled to the homestead exemption against federal taxes. *See Ferguson v. Ferguson*, 111 S.W.3d 589, 597–98 (Tex. App.—Ft. Worth 2003, no. pet.); TEX. CONST. ART. XVI, § 52; TEX. PROB. CODE ANN. § 283. Under *Ankenbrandt*, therefore, *Burford* abstention must be considered *sua sponte*.

B.

As a prerequisite to *Burford* abstention, "timely and adequate state-court review [must be] available". *New Orleans Pub. Serv., Inc. v. City Council of New Orleans*, 491 U.S. 350, 361 (1989) (*"NOPSI"*). Such review of whether Merkel and Pollard were married at the time of Merkel's death is available. As previously discussed, that very issue has been decided by the Texas probate court; and, based on available court records, that ruling apparently is subject to review on appeal in state court.

The doctrine also requires that, before the court may abstain, the federal court be sitting in equity or otherwise petitioned for discretionary relief. *Id.*; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). An action to quiet title is an equitable action. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 711 (5th Cir. 1951). Further, both parties sought declaratory judgments regarding the status of Pollard and Merkel's marriage as of her death, and such judgments are considered discretionary relief. *Quackenbush*, 517 U.S. at 719.

If, as they are here, these prerequisites are met,

> a federal court...must decline to interfere...:(1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern'.

*NOPSI*, 491 U.S. at 361 (quoting *Colo. River*, 424 U.S. at 814). (Although *NOPSI* speaks of interference "with the proceedings or orders of state administrative agencies", the Supreme Court has "since provided more generalized descriptions of the *Burford* doctrine", *Quackenbush*, 517 U.S. at 725; and, as such, our court has held *Burford* abstention is not limited to"where the state regulatory scheme is fully in place". *Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997).)

Our court considers five factors to determine whether *Burford* abstention is appropriate:

> (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled

> issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review.

*Moore v. State Farm Fire & Cas. Co.*, 556 F.3d 264, 272 (5th Cir. 2009) (internal citation omitted). Each of these factors overwhelmingly favors abstention here.

Regarding the first factor, although this case nominally arises under federal law, we have held:

> *Burford* abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does on whether the plaintiff's claim may be in any way entangled in a skein of state law that must be untangled before the federal case can proceed.

*Sierra Club*, 112 F.3d at 795 (internal quotation marks omitted); *see also Koerner v. Garden Dist. Ass'n*, 78 F. App'x 960, 963 (5th Cir. 2003) (unpublished) (holding *Burford* abstention appropriate and stating: "Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues".). The estate's federal quiet-title claim is clearly "entangled in a skein of state law". No one

disputes Pollard is liable for unpaid federal income taxes; the only issue is the degree and nature of his ownership interest in the house. For this appeal, and the only issue raised for it, this issue turns entirely on Texas domestic-relations law.

For the second factor, whether unsettled issues of state law are raised, the *only* issue briefed here by both parties is, again, whether Merkel and Pollard were married when Merkel died. The estate maintains: the divorce court's first decree was a final judgment, subject only to modification on appeal; therefore, when Pollard appealed that judgment, but failed to raise dissolution of marriage as a point of error, the appellate court lacked jurisdiction to consider dissolution of marriage. Pollard counters: although an appellate court may have the power to sever dissolution of marriage from property division, that did not occur because Pollard did not file a notice of limitation of appeal; therefore, the entire case was before the appellate court. The district court stated that Texas law contains contradictory precedent on whether the dissolution of marriage must be expressly excluded in the notice of appeal. This, therefore, is an unsettled issue of Texas state domestic law and appellate procedure.

For the third factor, the importance of Texas' interest in its own domestic-relations law is obvious. "Family relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979); *see also Begum v. Miner*, 2000 WL 554953, at *3 (5th Cir. 2000) (unpublished) (holding abstention appropriate

in a case involving adoption because, *inter alia*, a State has an important interest in a "key issue of state family law"). Further, in *DuBroff v. DuBroff*, 833 F.2d 557, 562 (5th Cir.1987), our court recognized the importance of Texas' interest in its divorce law, holding *Burford* abstention was appropriate where the plaintiff alleged her ex-husband and others had violated RICO by deceiving her in a divorce settlement. (As our court noted in *Begum*, *DuBroff* was decided before *Ankenbrandt*, which narrowed the reach of *Burford* abstention in domestic-relations cases; we "therefore do not base our decision on [this] Fifth Circuit precedent[], though we note that [it is] consistent with our holding". 2000 WL 554953, at *3 n.6.)

In addition, concerning the fourth abstention factor, Texas obviously needs a coherent domestic-relations policy, and, more narrowly, a coherent policy for when, and how, a divorce ruling may be severed on appeal. Therefore, the third and fourth factor weigh heavily in favor of *Burford* abstention.

Finally, for the fifth factor, Texas has created "a special state forum for judicial review" of divorce actions. *See* TEX. GOV. CODE ANN. § 24.601 *et. seq.* (establishing a comprehensive system of family courts). It goes without saying that these courts have the experience and expertise in Texas divorce law that federal courts lack. *See Ankenbrandt*, 504 U.S. at 704 (noting "the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of [divorce,

alimony, and child custody] decrees").

Again, each of the five *Burford* factors overwhelmingly favors abstention. And, although "the doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a [federal] [c]ourt to adjudicate a controversy properly before it", *Colorado River*, 424 U.S. at 813 (internal quotation omitted), this married *vel non* issue arising in Texas divorce proceedings easily falls within this narrow exception. Therefore, we hold *sua sponte* that *Burford* abstention should be applied.

III.

For the foregoing reasons, the judgment is VACATED and this action is DISMISSED.

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2009 U.S. Dist. LEXIS 59016

July 9, 2009, Decided
July 9, 2009, Filed

MEMORANDUM OPINION AND ORDER

Defendant-counterplaintiff Rupert M. Pollard ("Pollard") seeks an award of attorney's fees from plaintiff-counterdefendant Estate of Marie A. Merkel ("the Estate") pursuant to *Fed. R. Civ. P. 54(d)(2)* and *28 U.S.C. § 2412*. For the reasons that follow, the court denies the motions.

I

Because the court has written several [*1] opinions in this case, it need not recount the background facts and procedural history at length. *See, e.g., Estate of*

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[1] Although the Estate is the plaintiff, it asserted an affirmative defense to [*4] Pollard's declaratory judgment counterclaim asserting homestead rights in the Beverly House.

*Merkel v. United States, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *2 (N.D. Tex. July 29)* ("*Merkel I*"), *reconsideration denied, 2008 U.S. Dist. LEXIS 59571, 2008 WL 3152974 (N.D. Tex. Aug. 6, 2008)* (Fitzwater, C.J.), *appeal docketed*, No. 09-10203 (5th Cir. Mar. 10, 2009). The Estate brought this action--which is essentially an offshoot of a protracted divorce litigation--against Pollard and defendant United States of America ("the government") to quiet title to certain real property--the "Beverly House."[1] The Estate sought a declaratory judgment establishing that Pollard had no interest in the Beverly House because he and his late wife, Marie A. Merkel ("Merkel"), were legally divorced at the time of her death, and because Pollard had deeded his interest in the Beverly House to Merkel. Pollard counterclaimed for a declaratory judgment that he and Merkel were in fact married at the time of her death; that the deed was invalid; that, as Merkel's surviving spouse, he owned a one-half community property interest in the Beverly House; and that he was entitled to homestead rights in the property. Pollard also sought the [*3]

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[2] The Estate sued the government because it had filed multiple tax liens against the Beverly House based on Pollard's tax liabilities. The claim against the government and the government's involvement in this case are irrelevant to the present motions for attorney's fees.

[3] *Section 2412* is part of the Equal Access to Justice Act ("EAJA"). "Under the [EAJA], a party that prevails against the United States is generally entitled to attorney's fees unless the United States' position was 'substantially justified' or 'special

imposition of a constructive trust on the Beverly House and restitution of a special warranty deed to the Beverly House that he had executed in response to a state-court divorce decree that was reversed on appeal.

In *Merkel I* the court granted partial summary judgment in Pollard's favor, holding that Pollard and Merkel were still married at the time of her death and that Pollard thus owned a one-half community property interest in the Beverly House. *Merkel I, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *2-*3.* The court also held that Pollard was entitled to restitution of the special warranty deed to the Beverly House. *2008 U.S. Dist. LEXIS 57687, [WL] at *3.* The parties later tried to a jury the Estate's affirmative defense that Pollard had abandoned his homestead interest in the Beverly House. [2] The jury returned a verdict in Pollard's favor, finding that the Estate failed to prove abandonment.

Based on the court's opinions deciding various motions, and on the jury verdict, the court entered judgment declaring that Merkel and Pollard were

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circumstances make an award unjust.'" *Hexamer v. Foreness, 997 F.2d 93, 93-94 (5th Cir. 1993)* (quoting *28 U.S.C. § 2412(d)(1)(A)*. Although Pollard cites the EAJA in the introductory paragraphs of his motions, he does not mention it again in his briefing, and he does not appear [*6] to seek attorney's fees from the government. Even if Pollard were seeking attorney's fees under the EAJA, he is not entitled to them because he did not prevail against the government, much less show that the government's position was not substantially justified.

legally married on the date of Merkel's death, that Pollard owns a one-half community property interest in the Beverly House, and that Pollard has a homestead interest in the Beverly House. The court awarded Pollard restitution of the special warranty deed that he had executed to the Beverly House, but it denied Pollard's request to impose a constructive trust on the Beverly House and otherwise denied the relief that he sought.

Pollard now moves in two separate motions for attorney's fees under *Rule 54(d)(2)* and *28 U.S.C. § 2412*. [3] The first motion seeks fees for services rendered by the contract attorneys who assisted Pollard in the pretrial phases of this case and by Dennis Olson, Esquire, who represented Pollard at trial. The second motion seeks fees for legal services that Pollard rendered as a *pro se* litigant who is a licensed attorney. [4] Pollard maintains that he is entitled to recover attorney's fees based on (1) the federal Declaratory Judgment [*5] Act ("DJA"), *28 U.S.C. §§ 2201, 2202*; (2) *§§ 37.004* and *37.009 of the Texas Declaratory Judgments Act* ("TDJA"), *Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.011* (Vernon 2008); (3) *Tex. Civ. Prac. & Rem. Code Ann. § 38.001(3)* and *(8)* (Vernon 2008); and (4) equitable principles (the law of restitution and quasi-contract, and based on the contentions that the Estate

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[4] Although the record reflects that Pollard primarily engaged in the practice of medicine, he is also licensed to practice law in Texas.

brought the lawsuit in bad faith and that it was vexatious).[5] The court holds that none of these statutes or principles entitles Pollard to recover attorney's fees. Because the court denies Pollard's requests for attorney's fees for reasons applicable to both motions, the court will discuss them together.

II

A

Pollard first seeks an award of attorney's fees based on the DJA, *28 U.S.C. §§ 2201* and *2202*.

"*Section 2201*, which authorizes federal courts to grant declaratory relief, plainly does not grant a right to fees." *Self-Insurance Inst. of Am., Inc. v. Korioth, 53 F.3d 694, 697 (5th Cir. 1995). Section 2202 of the DJA* provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted . . . against any adverse party whose rights have been determined by such judgment." But *§ 2202* "does not by itself provide statutory authority to award attorney's fees that [*7] would not otherwise be available under state law in a diversity action." *Utica Lloyd's of Tex. v. Mitchell, 138 F.3d 208, 210 (5th Cir. 1998)* (quoting *Mercantile Nat'l Bank v. Bradford Trust Co., 850 F.2d 215, 218 (5th Cir. 1988)*). "[A]ttorney's fees are recoverable by such a litigant [under *§ 2202*] only

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[5] In his February 18, 2009 motion, Pollard states that he seeks fees based on the court's February 4, 2009 memorandum opinion and order. That opinion does not support an award of attorney's fees for Pollard.

where they are recoverable under non-declaratory judgment circumstances." *Mercantile Nat'l Bank, 850 F.2d at 216.* This means that such a recovery "is confined to two situations: (i) where, under the restrictive American rule attorney's fees are allowed; and (ii) where controlling substantive law permits recovery." *Id.*

Pollard cannot establish that he is entitled to fees under the restrictive American Rule. "Federal courts follow the American Rule in the absence of fee-shifting congressional legislation." *Utica Lloyd's of Tex., 138 F.3d at 210* (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)).* Pollard cites no applicable fee-shifting congressional legislation. Nor, for reasons that the court explains below, *see infra* § II(B)-(D), can Pollard show that he is entitled to recover under other controlling substantive law.[6]

B

Pollard contends that two different state laws support an award of attorney's fees. First, he cites the TDJA, and, specifically, *§§ 37.004* and *37.009.*

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[6] The court recognizes that attorney's [*8] fees are appropriate under *§ 2202* in "cases of bad faith, vexation, wantonness, or oppression relating to the filing or maintenance of the action." *Allstate Ins. Co. v. Mader, 201 Fed. Appx. 261, 264 (5th Cir. 2006)* (per curiam) (quoting *Mercantile Nat'l Bank, 850 F.2d at 218*). But as the court explains *infra* at § II(D), Pollard has not demonstrated that he is entitled to recover fees on this basis.

The TDJA does not authorize the court to award fees directly based on the TDJA or derivatively through the DJA.

The TDJA does not of itself authorize an award of attorney's fees because "it functions solely as a procedural mechanism" and therefore does not apply in diversity cases or in federal question cases. *Utica Lloyd's of Tex., 138 F.3d at 210* (rejecting contention that *§ 37.009 of TDJA* authorized recovery of attorney's fees); *see also Bank One Tex. NA v. Patterson, 121 F.3d 704, 1997 WL 450116, at *1 (5th Cir. 1997)* (per curiam) (unpublished opinion) (holding that TDJA functions solely as procedural mechanism and that Texas procedure [*9] does not govern federal question cases in federal courts).

Nor does the TDJA authorize a fee award derivatively through the DJA. Although under the DJA a party may recover attorney's fees where "controlling substantive law" permits such a recovery, the TDJA "is neither substantive nor controlling." *Self-Insurance Inst. of Am., 53 F.3d at 697.*

C

Pollard contends, second, that *Tex. Civ. Prac. & Rem. Code Ann. § 38.001* (Vernon 2008)--specifically *§ 38.001(3)* and *(8)*--authorizes a recovery of attorney's fees. This statute provides, *inter alia*, that a person may recover attorney's fees "if the claim is for . . . (3) furnished material . . . or (8) an oral or written contract." *Id. § 38.001.* Pollard made no claim in this case for furnished material, so *§*

*38.001(3)* is inapposite. Similarly, Pollard did not assert claims for an oral or written contract. Pollard prevailed on declaratory judgment claims that did not involve a breach of contract. Pollard argues that the judgment in this case "sounds in contract" because he received restitution of the deed to the Beverly House, and restitution is a remedy that "sounds in contract." Although the court granted Pollard restitution of the special warranty [*10] deed, it did so based on a holding that Pollard and Merkel were not divorced at the time of Merkel's death, and that the deed should be returned to Pollard pursuant to principles laid out in the Restatement of Restitution. *See Merkel I, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *3.* The court did not grant restitution based on the breach of a contractual duty or obligation by the Estate, nor were Pollard's claims based on such a breach. *See Schlobohm v. Pepperidge Farm, Inc., 806 F.2d 578, 582 (5th Cir. 1986)* (holding that essential element of attorney's fees award under *§ 38.001* "is the existence of a duty or obligation which the opposing party has failed to meet" (quoting *Ellis v. Waldrop, 656 S.W.2d 902, 905 (Tex. 1983))).* Pollard has cited no Texas cases, and the court has found none, that have awarded attorney's fees under *§ 38.001(8)* simply because the remedy of restitution was granted to a party. Pollard has not shown that he prevailed on a claim for an oral or written contract, and he is not entitled to recover attorney's fees under *§ 38.001(8).*

D

Pollard also requests a fee award under equitable principles. "Attorney's fees are appropriate under *§ 2202* in 'cases of bad faith, vexation, wantonness, [*11] or oppression relating to the filing or maintenance of the action.'" *Allstate Ins. Co. v. Mader, 201 Fed. Appx. 261, 264 (5th Cir. 2006)* (per curiam) (quoting *Mercantile Nat'l Bank, 850 F.2d at 218*). Federal courts also have a limited, inherent power to impose sanctions against a vexatious litigant. *See Newby v. Enron Corp., 302 F.3d 295, 302 (5th Cir. 2002).* The Supreme Court has held that "a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc., 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (internal quotation marks and citations omitted). The imposition of sanctions using the court's inherent power should be reserved for situations in which the court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled." *Id. at 46* (quoting *Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946)).*

Despite Pollard's bald assertions to the contrary, the court finds that the Estate's conduct did not amount to bad faith, vexation, wantonness, or oppression. There is no indication that the Estate has acted oppressively, wantonly, or in bad faith. Nor were the Estate's claims [*12] or defenses vexatious. If anything, the Estate presented questions of law and fact that reasonably required resolution by the court

or by a jury. Accordingly, the court declines to assess attorney's fees under *§ 2202* or its inherent power to impose sanctions.

* * *

For the foregoing reasons, the court denies Pollard's February 18, 2009 and February 27, 2009 motions for attorney's fees.

SO ORDERED.

July 9, 2009.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants.

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

*2009 U.S. Dist. LEXIS 8270*

February 4, 2009, Decided
February 4, 2009, Filed

MEMORANDUM OPINION AND ORDER

Following a jury verdict finding that plaintiff-counter defendant Estate of Marie A. Merkel ("the Estate") failed to prove that defendant-counter plaintiff Rupert M. Pollard ("Pollard") abandoned his homestead interest in the residence that is the subject of this lawsuit (the "Beverly House"), the court decides the carried motions in this case and addresses Pollard's counterclaim for a constructive trust [*2] in light of the verdict. For the reasons that follow, the court enters judgment today partly in favor of Pollard, and it denies all relief that the Estate seeks.

I

The relevant background facts are set out in several prior opinions in this case and need not be repeated. *See, e.g., Estate of Merkel v. United States, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *1 (N.D. Tex. July 29), reconsideration denied, 2008 U.S. Dist. LEXIS 59571, 2008 WL 3152974 (N.D. Tex. Aug. 6, 2008)* (Fitzwater, C.J.). Additionally, the parties tried to a jury the Estate's affirmative defense that Pollard had abandoned his homestead interest in the Beverly House. The jury returned a verdict in Pollard's favor, finding that the Estate had failed to prove abandonment. Prior to trial, the Estate filed three motions that the court carried with the case.[1] *See Estate of Merkel v. United States*, No. 3:06-CV-1891-D, order at 1-2 (N.D. Tex. Jan. 13, 2009) (Fitzwater, C.J.) (unpublished order). Pollard requested in his counterclaim that the court impose a constructive trust. Because this request for relief is to be decided by the court, it was not submitted to the jury at trial. The carried motions and the request for a constructive trust are before

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[1] These motions are the Estate's December 30, 2008 motion for reconsideration of plaintiff's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, as supplemented by a January 6, 2009 filing; January 6, 2009 motion to stay defendant's counterclaims; and January 6, 2009 second motion for reconsideration of the court's ruling on summary judgment.

the court for decision. [*3][2]

II

The court first considers whether it should impose a constructive trust on the Beverly House, as Pollard requests in his second amended answer and counterclaim. [3]

A constructive [*4] trust is an equitable remedy that courts may impose to prevent unjust enrichment. *See, e.g., In re Bradley, 501 F.3d 421, 432 (5th Cir. 2007)* (applying Texas law); *Troxel v. Bishop, 201 S.W.3d 290, 297 (Tex. App. 2006, no pet.)*. Under Texas law, a court may impose a constructive trust when the claimant establishes that "(1) the debtor has committed actual fraud or has committed constructive fraud through the breach of a preexisting fiduciary or confidential relationship, (2) the debtor would be unjustly enriched by retaining the proceeds of the wrong, and (3) there is a traceable res upon which to impress the trust."

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[2] Pollard has not yet had the opportunity to file opposition briefs to the Estate's carried motions, and the Estate has not beenable to file a brief in opposition to Pollard's request for a constructive trust. Because the court is denying the Estate's motions and Pollard's request, it need not await the filing of opposition briefs before entering its rulings.

[3] Despite the imprecise language of the counterclaim, the court has held that it should be interpreted to cover only the Beverly House, not other marital property (including personal property). *See Estate of Merkel*, No. 3:06-CV-1891-D, order at 2-4.

*Bradley, 501 F.3d at 432.* The decision whether to impose a constructive trust, however, remains within the discretion of the trial court. *Troxel, 201 S.W.3d at 297.*

The court declines for two reasons to grant Pollard's request for imposition of a constructive trust on the Beverly House. First, Pollard has failed to establish, or even to allege, that the Estate has committed actual or constructive fraud.

Second, the imposition of a constructive trust is unnecessary because there is no risk that the Estate will be unjustly enriched. The court has already held that Pollard [*5] owns a one-half community property interest in the Beverly House, and that he is entitled to restitution of the deed he executed to the Beverly House. *Estate of Merkel, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *3.* In its judgment filed today, the court also declares that Pollard has a homestead interest in the Beverly House. This judgment is sufficient to secure Pollard's interest in the Beverly House. Also, Pollard has filed *lis pendens* notices on the Beverly House, which further protect his interests in the property. Imposing a constructive trust on the Beverly House is therefore unnecessary.

For these reasons, the court declines to impose a constructive trust on the Beverly House, and it dismisses this component of Pollard's counterclaim

with prejudice. [4]

III

The court next addresses the Estate's motion for reconsideration of the court's memorandum opinion and order denying the Estate's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See Estate of Merkel v. United States, 2008 U.S. Dist. LEXIS 103589, 2008 WL 5378183 (N.D. Tex. Dec. 23, 2008)* (Fitzwater, C.J.).

In a December 23, 2008 memorandum opinion and order, the court denied the Estate's motion on the basis that the Estate did not show that the probate exception precluded the court from exercising subject matter jurisdiction over Pollard's counterclaim for imposition of a constructive trust. The Estate's motion to reconsider appears to rest on the premise that the court lacks subject matter jurisdiction to impose a constructive trust on personal property in the custody of a state probate court. In light of the court's January 13, 2009 order, which held that the counterclaim covers only the Beverly House and not

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[4] In addition to denying the request for a constructive trust, the court also dismisses any other relief that Pollard may be seeking in P 70 of his second amended answer and counterclaim for declaratory judgment. As the court explained in its January 13, 2009 order, in granting Pollard leave to amend, the court did not intend to increase the scope of his counterclaim to include property other than the Beverly House. *Estate of Merkel*, No. 3:06CV-1891-D, [*6] order at 2-4.

any personal property, and today's decision confirming that order, *see supra* note 3, the court denies the Estate's motion for reconsideration as moot.[5]

IV

The court now turns to the Estate's motion to stay Pollard's counterclaims, and it denies the motion as moot.

The Estate moves the court to stay the counterclaim Pollard asserts in P 70 of his second amended answer and counterclaim, in which Pollard seeks imposition of a constructive trust. Alternatively, the Estate seeks severance of the counterclaim. Because the court is dismissing this counterclaim with prejudice, *see supra* § II, the Estate's motion is denied as moot.

V

Finally, the court addresses the Estate's second motion for reconsideration of the court's ruling on summary judgment.

For a second time, the Estate moves the court to reconsider its holding that Pollard and Marie A. Merkel ("Merkel") were not divorced prior to Merkel's death. *See Estate of Merkel, 2008 U.S.*

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[5] To the extent the Estate's motion for reconsideration could be [*7] interpreted to argue that the court does not have subject matter jurisdiction over Pollard's counterclaim as it applies to the Beverly House, the court holds that it does have subject matter jurisdiction.

*Dist. LEXIS 57687, 2008 WL 3152986, at *2-*3, reconsideration denied, 2008 U.S. Dist. LEXIS 59571, 2008 WL 3152974, at *1-3.* Specifically, the Estate contends that the court committed a manifest error of law in holding that, when the Texas court of appeals reversed and [*8] remanded the trial court's judgment, [6] the general reversal and remand applied both to the portion of the judgment dissolving the marriage and to the portion of the judgment dividing the property. The Estate argues that, because the property division was the only part of the trial court's judgment attacked on appeal, the dissolution of the marriage remained final when the court of appeals reversed and remanded the trial court's judgment.

In support of its argument, the Estate relies on an unpublished, *per curiam* court of appeals opinion, *In re Chaisson, 2001 Tex. App. LEXIS 8266, 2001 WL 1588126 (Tex. App. Dec. 13, 2001)* (per curiam) (not designated for publication), which it cites for the first time in this its *second* motion for reconsideration and *third* brief on this issue. The court acknowledges that *Chaisson* appears to support the Estate's position. But the court declines to reconsider its prior rulings based on *Chaisson.*

Under *Tex. R. App. P. 47.7,* Texas courts of appeals opinions not designated for publication have no

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[6] The Texas court of appeals opinion at issue is *Pollard v. Merkel, 1999 Tex. App. LEXIS 975, 1999 WL 72209 (Tex. App. Feb. 12, 1999, no pet.)* (not designated for publication).

precedential value. Therefore, *Chaisson* [*9] is not even binding precedent in the court of appeals that decided it, much less a statement of Texas law that a federal court is obligated to follow. Moreover, *Chaisson* is a one-paragraph, *per curiam* opinion that contains very little analysis. In the memorandum opinions and orders that the Estate moves this court to reconsider, the court has relied on published, more extensively reasoned opinions of Texas courts of appeals and of the Supreme Court of Texas. Accordingly, the court denies the Estate's second motion for reconsideration of the court's ruling on summary judgment.

VI

For the reasons explained, the court dismisses Pollard's counterclaim seeking imposition of a constructive trust on the Beverly House, and it denies the following motions filed by the Estate: December 30, 2008 motion for reconsideration of plaintiff's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, as supplemented by a January 6, 2009 filing; January 6, 2009 motion to stay defendant's counterclaims; and January 6, 2009 second motion for reconsideration of the court's ruling on summary judgment. By judgment filed today, the court dismisses [*10] the Estate's actions against defendants United States of America and

Pollard with prejudice. [7]

The court enters judgment declaring that Merkel and Pollard were not divorced by the Decree of Divorce Judgment entered January 30, 1996 in Cause No. 92-2980-Z, by the 256th District Court, Dallas County, Texas; that Merkel and Pollard were not divorced by the Amended Divorce Decree Judgment entered May 7, 2001 in Cause No. 92-2980-Z, by the 256th District Court, Dallas County, Texas; that Merkel and Pollard were legally married on October 10, 2004, the date of Merkel's death; that Pollard owns a one-half community property interest in the Beverly House; and that Pollard has a homestead interest in the Beverly House. The court awards Pollard restitution of the special warranty deed to the Beverly House [*11] that he executed on May 3, 2001 in response to the Amended Divorce Decree. The court also awards Pollard his taxable costs of court, but it otherwise denies the remaining relief that Pollard seeks. [8] Pollard may apply for an award of attorney's fees under the procedure

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[7] The Estate requests that the court quiet title to the Beverly House, establish that Pollard has no interest in the Beverly House, and establish that the Beverly House is not subject to any federal tax liens against Pollard or his property, and it seeks attorney's fees and costs. In view of the court's rulings and the jury verdict, the Estate is not entitled to any of this requested relief.

[8] Defendant United States of America does not seek affirmative relief in this litigation, but it is entitled to recover its taxable costs of court from the Estate.

established in *Fed. R. Civ. P. 54(d)(2).*

SO ORDERED.

February 4, 2009.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants.

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

*2008 U.S. Dist. LEXIS 103589*

December 23, 2008, Decided
December 23, 2008, Filed

MEMORANDUM OPINION AND ORDER

Plaintiff Estate of Marie A. Merkel ("the Estate") moves to dismiss a counterclaim asserted by defendant-counterplaintiff Rupert M. Pollard ("Pollard") for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. For the following reasons, the court denies the Estate's motion.[1]

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[1] Under § 205(a)(5) of the E-Government Act of 2002 and the definition of "written opinion" adopted by the Judicial Conference of [*2] the United States, this is a "written opinion[ ] issued by the court" because it "sets forth a reasoned explanation for [the] court's decision." It has been written, however, primarily for the parties, to decide issues presented in this case, and not for

I

Because this case is the subject of several prior opinions, the court need only briefly summarize the pertinent background facts and procedural history. The United States of America (the "government") filed multiple liens against a residence (the "Beverly House") based on Pollard's tax liabilities. The Estate then brought this action against the government and Pollard to quiet title to the Beverly House, maintaining that the Estate owns the house and that Pollard has no interest in it. The court held that Pollard owns a one-half community property interest in the Beverly House. *Estate of Merkel v. United States, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at *3 (N.D. Tex. July 29, 2008), reconsideration denied, 2008 U.S. Dist. LEXIS 59571, 2008 WL 3152974 (N.D. Tex. Aug. 6, 2008)* (Fitzwater, C.J.). After the court issued this ruling, Pollard sought and obtained leave to amend. *Estate of Merkel v. United States, 2008 U.S. Dist. LEXIS 81674, 2008 WL 4566477, at *3 (N.D. Tex. Oct. 10, 2008)* [*3] (Fitzwater, C.J.). Pollard then filed a second amended answer and counterclaim for declaratory judgment.

The Estate now moves to dismiss the following newly-asserted counterclaim in which Pollard asks the court to impose a constructive trust:

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publication in an official reporter, and should be understood accordingly.

> Pollard further requests that this Court enter a judgment imposing a constructive trust upon the assets of the heretofore undivided marital community property, including but not limited to the Beverly House, and that the Executor as constructive trustee of the Beverly House be ordered to make restitution of the value of the use of the property and to convey legal title to Pollard.

D. 2d Am. Answer & Countercl. P 70. The Estate contends that this request for imposition of a constructive trust should be dismissed under *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdiction because it falls within the probate exception to federal jurisdiction. It also asserts that the request should be dismissed under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted.

II

The probate exception to federal jurisdiction is a judge-made exception that precludes federal courts from interfering with probate proceedings. *Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 90 L. Ed. 256 (1946).* [*4] The *Markham* Court held that federal courts have jurisdiction over claims "in favor of creditors, legatees, and he[ir]s and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the

property in the custody of the state court." *Id.* (internal quotation marks omitted). Recently, the Court reiterated that the probate exception should be construed narrowly, and it attempted to clarify its scope. *See Marshall v. Marshall, 547 U.S. 293, 310-12, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).* *Marshall* concluded that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Id. at 311-12.* The Court emphasized, however, that "it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id. at 312.*

III

When challenging subject matter jurisdiction under *Rule 12(b)(1)*, a party can make either a facial attack or a factual attack. [*5] *See Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981).* If the party merely brings a *Rule 12(b)(1)* motion, it is considered a facial attack, and the court looks only at the sufficiency of the allegations in the pleading, assuming them to be true. *Id.* If the allegations are sufficient to allege jurisdiction, the court must deny the motion. *Id.* A party may make a factual attack on subject matter jurisdiction by submitting evidence, such as affidavits or testimony. *IBEW-NECA Sw. Health & Benefit Fund v. Winstel, 2006 U.S. Dist. LEXIS 18666, 2006 WL 954010, at *1 (N.D. Tex.*

*Apr. 12, 2006)* (Fitzwater, J.) (citing *Paterson, 644 F.2d at 523*). When a movant provides evidence factually attacking subject matter jurisdiction, the party attempting to invoke jurisdiction must submit evidence and prove by a preponderance of the evidence that the court has jurisdiction. *Id.*

The court treats the Estate's motion to dismiss as a facial attack because it has not provided any evidence, such as affidavits or testimony, challenging a factual matter that bears on jurisdiction. [2]Thus the court looks only to Pollard's counterclaim. *See id.; Paterson, 644 F.2d at 523.* Pollard seeks a judgment "imposing a constructive trust upon [*6] the assets of the heretofore undivided marital community property, including but not limited to the Beverly House." D. 2d Am. Answer & Countercl. P 70. The Estate interprets this counterclaim as seeking the imposition of a constructive trust on both the Beverly House and other personal property, and it contends that this request implicates the probate exception to federal jurisdiction.

Pollard's counterclaim does not necessarily fall within the probate exception. The probate exception

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[2] The Estate has attached two exhibits to its motion to dismiss. It does not present evidence, however, challenging a factual matter that bears on subject matter jurisdiction. *See id.* (holding that, although plaintiff submitted affidavits in support of motion to dismiss, they did not challenge factual matter bearing on jurisdiction).

precludes federal courts from probating a will, administering a decedent's estate, and disposing of property that is in the custody of a state probate court. *See Marshall, 547 U.S. at 311-12.* Pollard's counterclaim does not request that the court perform any of these functions. Accordingly, the Estate has failed to show that the court lacks subject matter jurisdiction over Pollard's [*7] counterclaim.[3]

IV

The Estate also moves to dismiss Pollard's counterclaim under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted. "To survive a *Rule 12(b)(6)* motion to dismiss, [Pollard] must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).* The Estate's only argument is that Pollard has not stated a claim to relief that can be granted because the court does not have jurisdiction to grant the relief, presumably because of the probate exception. [*8] As the court

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[3] There is no indication in Pollard's counterclaim that the Beverly House or other undivided marital community property is in the custody of a state probate court. And as stated above, the Estate offered no evidence with its motion indicating that any of the property is in the custody of a probate court. The court notes, however, that if evidence presented at trial shows that any of the subject property is in the custody of a state probate court, the probate exception may preclude the court from imposing a constructive trust on that property.

has already held, the Estate has failed to show that Pollard's counterclaim falls within the probate exception and that the court lacks jurisdiction to grant the requested relief. Moreover, the court is unaware of any other reason that would preclude Pollard from obtaining the relief he seeks.

* * *

The Estate's November 6, 2008 motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is denied.

SO ORDERED.

December 23, 2008.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants.

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

*2008 U.S. Dist. LEXIS 81674*

October 10, 2008, Decided
October 10, 2008, Filed

MEMORANDUM OPINION AND ORDER

Defendant-counterplaintiff Rupert M. Pollard ("Pollard") moves to modify the scheduling order and for leave to amend pleadings. For the reasons set forth below, the court grants the motions.

I

Because this case is the subject of prior opinions, the court need only briefly summarize the pertinent procedural history.

On July 29, 2008 the court held that Pollard owns a one-half community property interest in real property--the [*2] "Beverly House"--in which plaintiff Estate of Marie A. Merkel ("the Estate") had contended that Pollard had no property interest.

*See Estate of Merkel v. United States, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986 (N.D. Tex. July 29, 2008), reconsideration denied, 2008 U.S. Dist. LEXIS 59571, 2008 WL 3152974 (N.D. Tex. Aug. 6, 2008)* (Fitzwater, C.J.). [1] After the court filed its memorandum opinion and denied reconsideration, Pollard filed on August 21, 2008 motions seeking leave to amend his pleadings and to modify the scheduling order. In the motion for leave to amend, Pollard seeks to file an amended answer and counterclaim requesting relief in the form of a judgment declaring and imposing a constructive trust on the assets in the undivided marital estate, including, but not limited to, the Beverly House. He also seeks relief ordering the Estate to make restitution for the value of the use of the property and to convey to him legal title of the Beverly House. The motion to modify the scheduling order seeks the same relief.

On September 16, 2008, [*3] presumably in an attempt to rectify a defect that the Estate pointed out in response to Pollard's original motions, he filed another motion for leave to amend pleadings that is nearly identical to the August 21 motion for leave. Because this motion does not rectify the defect, is nearly identical to the August 21 motion for leave,

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[1] There is still a pending dispute, however, over whether Pollard still has homestead rights in the Beverly House after having vacated the property. *See Estate of Merkel, 2008 U.S. Dist. LEXIS 57687, 2008 WL 3152986, at * 3-* 4.*

and does not offer sufficient reasons for filing a duplicative motion, the court denies the September 16 motion and addresses together the two motions filed August 21, 2008.

II

When the deadline for seeking leave to amend pleadings has expired, [2] a court considering a motion to amend must first determine whether to modify the scheduling order under the *Fed. R. Civ. P. 16(b)(4)* good cause standard. *See S&W Enters., L.L.C. v. South Trust Bank of Ala., N.A., 315 F.3d 533, 536 (5th Cir. 2003); Am. Tourmaline Fields v. Int'l Paper Co., 1998 U.S. Dist. LEXIS 19756, 1998 WL 874825, at *1 (N.D. Tex. Dec. 7, 1998)* (Fitzwater, J.). If the movant satisfies the requirements of *Rule 16(b)(4)*, the court must next determine whether to grant leave to amend under the more liberal standard of *Rule 15(a)(2)*, which provides that "[t] he court should freely give leave when justice so requires." *Rule 15(a)(2);* [*4] *see S&W Enters., 315 F.3d at 536; Am. Tourmaline Fields, 1998 U.S. Dist. LEXIS 19756, 1998 WL 874825, at *1.*

III

The court assesses four factors when deciding whether to grant an untimely motion for leave to

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[2] Under the scheduling order, the deadline for filing a motion for leave to amend pleadings expired May 8, 2007.

amend under *Rule 16(b)(4)*: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *S&W Enters., 315 F.3d at 536* (internal quotation marks and brackets omitted). Applying these factors, the court concludes that Pollard has shown good cause and thus grants his motion for leave to amend.

First, the court did not conclude that Pollard owned an interest in the Beverly House until after the deadline for seeking leave to amend pleadings had expired. Although it can reasonably be argued that Pollard should have requested a constructive trust in his earlier pleadings, the need to do so was not entirely clear until after the court filed its opinion. Pollard's explanation for not meeting the scheduling order's deadline is therefore satisfactory.

Second, [*5] the amendment is important to the case. As Pollard contends, the imposition of a constructive trust would help ensure that the Estate conveys to him legal title to the Beverly House. The Estate argues that the amendment is unnecessary because there is already a notice of *lis pendens* filed on the Beverly House. There is a difference, however, between a notice of *lis pendens*, which provides notice and prevents the house from being sold without addressing Pollard's cause of action, and a constructive trust, which would ensure that Pollard receives legal title to the Beverly House.

Third, no unfair prejudice would result from the amendment. Pollard seeks to add a remedy to the pleadings, not a new cause of action. Allowing the amendment will not necessitate additional discovery, nor should it cause delay. The Estate does not identify any unfair prejudice that would result from granting Pollard's motion for leave.

Because the court concludes that no unfair prejudice will result, the fourth factor is inapplicable.

Assessing the factors together, the court concludes that Pollard has demonstrated good cause to modify the scheduling order to allow him to file the amended pleading.

IV

Under the more [*6] liberal standard of *Rule 15(a)(2)*, "[t] he court should freely give leave when justice so requires." *Rule 15(a)(2)*.

A

The Estate maintains that the court should deny leave to amend because the court cannot impose a constructive trust on the Beverly House. It contends that the court lacks jurisdiction to administer the estates of decedents or to disturb the administration of an estate pending in Texas probate court. The court construes this as a futility argument, because the Estate is arguing that the court could not grant the requested relief even if the amendment were allowed. The court may deny a motion for leave to amend where the amendment would be futile. *See*

*Stripling v. Jordan Prod. Co., 234 F.3d 863, 872-73 (5th Cir. 2000).*

The Estate provides little support for this argument, however, and the court is unable to conclude that the amendment would clearly be futile. [3] The court discerns no other compelling reason for denying leave to amend under *Rule 15(a)(2).*

B

The Estate also argues that Pollard's motion should be denied because he failed to comply with N.D. Tex. Civ. R. 15.1. [*7] Rule 15.1(a), which applies to amended pleadings that will be filed on paper, [4] provides that "the party must attach a copy of the proposed amended pleading as an exhibit to the motion." [5] Although Pollard did submit a copy of the

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[3] This conclusion does not preclude the Estate from raising this argument in an appropriate trial motion.

[4] Although amended Rule 15.1(a) took effect September 1, 2008, it applies to this case because it is just and practicable to apply it to this pending civil action. [*8] So far as pertinent to the present motion, the version that took effect September 1, 2008 is not materially different from the prior version.

[5] Rule 15.1(a):

> (a) When Filed on Paper. When a party files a motion for leave to file an amended pleading that, if leave is granted, will be filed on paper, the party must attach a copy of the proposed amended pleading as an exhibit to the motion. The party must also submit with the motion an original and a judge's copy of the proposed pleading. The original and judge's copy must neither

proposed amended pleading to the court, he neither attached it as an exhibit to the motion nor served the Estate's counsel with a copy. The court concludes, however, that this failure to comply with Rule 15.1 does not warrant denying Pollard's motion. The motion itself gave the Estate sufficient notice so that it could properly respond. In fact, the proposed amendment to the pleadings--a request for imposition of a constructive trust--is included almost verbatim in the motion for leave. That said, after Pollard files his amended pleading, if the Estate can establish that it did not have a fair opportunity to respond properly to Pollard's motion for leave, it may move for relief from the granting of leave, provided it does so within 14 days of the date this memorandum opinion and order is filed.[6]

* * *

For the foregoing reasons, Pollard's August 21, 2008 motions to modify scheduling order and for leave to amend pleadings are granted. Pollard must file his second amended answer and counterclaim--electronically [*9] or on paper--within five business

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be physically attached to the motion nor made exhibits to the motion. The original of the proposed pleading must contain the original signature of the signing attorney. If leave is granted, the clerk will file the original of the amended pleading.

[6] This option is in addition, of course, to the right to challenge the merits of the amended pleading under *Rule 12(b)(6)* or *Rule 12(c)* or on any other basis provided under the Federal Rules of Civil Procedure.

days of the date this memorandum opinion and order is filed. His September 16, 2008 motion for leave to amend pleadings is denied.

SO ORDERED.

October 10, 2008.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants.

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

*2008 U.S. Dist. LEXIS 59571*

August 6, 2008, Decided
August 6, 2008, Filed

MEMORANDUM OPINION AND ORDER

Plaintiff Estate of Marie A. Merkel (the "Estate") moves the court to reconsider its decision granting in part defendant Rupert M. Pollard's ("Pollard's") motion for summary judgment and denying the Estate's motion for summary judgment. *See Estate of Merkel v. Pollard, 2008 U.S. Dist. LEXIS 57687 (N.D. Tex. July 29, 2008)* (Fitzwater, C.J.) ("*Merkel I*"). For the reasons that follow, the court denies the motion.

I

The relevant background facts and procedural history are set out in *Merkel* [*2] *I* and need not be repeated. *See 2008 U.S. Dist. LEXIS 57687, at *1-*3.* The Estate seeks a judicial declaration that

Pollard has no interest in certain property--the "Beverly House"--allegedly owned by the Estate. One of the central disputes in this case is whether Pollard and the Estate's decedent, Marie A. Merkel ("Merkel"), were divorced at the time of Merkel's death. Arguing that they were, the Estate relies on a divorce decree that was entered in 1996 but was later reversed on appeal. *See Pollard v. Merkel, 1999 Tex. App. LEXIS 975, 1999 WL 72209, at *1 (Tex. App. Feb. 12, 1999, no pet.)* (not designated for publication) ("*Pollard I*"). The Estate maintains that Merkel and Pollard remained divorced, despite this reversal, because *Pollard I* applied only to the division of marital property, not to the marital status of Merkel and Pollard. In *Merkel I* the court disagreed. *See Merkel I, 2008 U.S. Dist. LEXIS 57687, at *7-*8.* It explained that [HN1] "'the division of a marital estate is not a claim severable from the rest of a divorce proceeding,'" *2008 U.S. Dist. LEXIS 57687, at *5* (quoting *Dawson-Austin v. Austin, 968 S.W.2d 319, 324 (Tex. 1998))*, and that, because there was never a final disposition of the property issues before Merkel's death, the divorce could [*3] never have become final, *2008 U.S. Dist. LEXIS 57687, at *6-*8.*

In its motion for reconsideration, the Estate maintains that the authorities relied on in *Merkel I* pertain only to a trial court's authority to sever the divorce and marital property issues, and that an appellate court in fact has the authority to affirm and sever the issue of divorce before partially remanding the case for a division of the property

alone.

II

The court recognizes that some Texas cases support the premise that an "appellate court does have the authority to affirm and sever the issue of divorce and remand for re-division of the property alone." *Herschberg v. Herschberg, 994 S.W.2d 273, 277 (Tex. App. 1999, no pet.)* (citing *In re Marriage of Knighton, 685 S.W.2d 719, 723 (Tex App. 1984, no writ)* (on rehearing)). But the decisions that support this principle all involved reversals that explicitly affirmed the divorce issue while remanding the property division (or other) issue. *See McKnight v. McKnight, 543 S.W.2d 863, 864, 868 (Tex. 1976)* ("The judgment of the court of civil appeals is reversed and the cause is remanded to the trial court for division of the property. In all other respects the judgment of the court of civil appeals [*4] is affirmed."); *Herschberg, 994 S.W.2d at 275* ("We affirm the trial court's judgment granting the divorce. We reverse the rest of the judgment and remand the case to the trial court for a jury trial." (internal quotation marks omitted) (quoting prior opinion of court of appeals); *Knighton, 685 S.W.2d at 723* ("[The] motion for rehearing is granted to the extent that the portion of the trial court's judgment granting the divorce and dividing the marital property of the parties is affirmed. The portion of the trial court's judgment determining conservatorship of the minor children of the parties is reversed and the case is remanded for retrial of all issues pertinent to conservatorship, possession and support

of the children."); *Roach v. Roach, 672 S.W.2d 524, 532 (Tex. App. 1984, no writ)* ("[T]hat part of the trial court's judgment decreeing that [the parties] . . . are divorced is affirmed; otherwise, the judgment is reversed and the cause remanded to the trial court."). But the decision of the court of appeals in *Pollard I* did not affirm the divorce decree and remand the property division. Instead, the court of appeals "reverse[d] the trial court's *judgment and remand[ed] this cause* [*5] for further proceedings." *Pollard I, 1999 Tex. App. LEXIS 975, 1999 WL 72209, at *3* (emphasis added). Its contemporaneous judgment contained the same unqualified language. *See* Pollard App. Ex. B(5) (judgment) ("[T]he judgment of the trial court is REVERSED and *this* cause is REMANDED to the trial court for further proceedings." (italicized emphasis added; other emphasis omitted)).

The Estate argues that *Pollard I* severed the issues *implicitly* because it lacked jurisdiction to consider the divorce portion of the judgment. The Estate cites *Grossnickle v. Grossnickle, 935 S.W.2d 830, 849 (Tex. App. 1996, writ denied)*, which held that "[a]n appellate court's jurisdiction is limited to the matters designated in the notice of limitation of appeal." *Id.* (relying on Tex. R. App. P. 40(a)(4) (repealed Sept. 1, 1997)). Although the Estate acknowledges that Pollard never actually filed a notice of limitation of appeal, it contends that the same result was achieved when Pollard admitted in an appellate brief that he was not contesting the divorce. The court disagrees.

The rule of procedure on which *Grossnickle* relies, and which governed *Pollard I*,* provided:

> Notice of Limitation of Appeal. No attempt to limit the scope of [*6] an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on all other parties to the trial court's final judgment within fifteen days after judgment is signed[.]

Tex. R. App. P. 40(a)(4) (repealed Sept. 1, 1997). In other words, the only way Pollard could have limited the scope of the appeal under Rule 40(a)(4) was by filing the notice. *See id.* Because Pollard did not do this, nothing in former Rule 40(a)(4) could have restricted the *Pollard I* court's jurisdiction.

The Estate also cites *Kang v. Hyundai Corp. U.S.A., 992 S.W.2d 499 (Tex. App. 1999, no pet.)*, which holds that a party's "[f]ailure to cite any authority [in his brief] constitutes a waiver of the alleged error." *Id. at 503.* But [HN3] the mere waiver of an issue on appeal does not operate to divest the court of appeals of *jurisdiction* over that issue (and thus require severance). If it did, courts of appeals would lack the discretion to consider an issue that [*7] has been waived. *See, e.g., Fredonia State Bank v. Gen. Am. Life. Ins. Co., 881 S.W.2d 279, 284 (Tex. 1994)* ("[It] is the settled rule that an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing[.]").

Lacking jurisdiction, they would be precluded from considering the waived error.

Because the issue of divorce was never excluded from the *Pollard I* court's jurisdiction, it could not have been implicitly affirmed by the general remand order. *See Grossnickle, 935 S.W.2d at 849-50* (holding that general remand order did not implicitly affirm issue of attorney's fees, even though the issue was not raised or discussed on appeal, because notice of limitation did not exclude issue). The court therefore disagrees with the Estate that the *Pollard I* court implicitly affirmed the divorce decree. The record reflects that the court of appeals in *Pollard I,* unlike other Texas courts that have affirmed divorce decrees and remanded property division issues to the trial court, did not do so. This court therefore adheres to its decision in *Merkel I* that Merkel and Pollard were not divorced prior to her death.

* * *

The Estate's August 1, 2008 motion [*8] for reconsideration is denied.

SO ORDERED.

August 6, 2008.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

ESTATE OF MARIE A. MERKEL, MATTHEW R. POLLARD, Independent Executor, Plaintiff, VS. UNITED STATES OF AMERICA and RUPERT M. POLLARD, Defendants.

Civil Action No. 3:06-CV-1891-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

*2008 U.S. Dist. LEXIS 57687*

July 29, 2008, Decided
July 29, 2008, Filed

MEMORANDUM OPINION AND ORDER

This case--essentially an offshoot of protracted divorce litigation--is a quiet title action brought by plaintiff Estate of Marie A. Merkel (the "Estate") against defendants the United States of America (the "government") and Rupert M. Pollard ("Pollard"). Pollard counterclaims. The Estate filed suit because the government has imposed tax liens on real property--the "Beverly House"--that the Estate maintains it owns, and that it contends are the [*2] result of the tax liabilities of Pollard, whom the Estate contends has no property interest in the Beverly House. To resolve the pending cross-motions for summary judgment, the principal question the court must decide is whether Pollard has a property interest in the Beverly House. Concluding that he

does, the court denies the Estate's motion and grants in part Pollard's motion.

I

Insofar as pertinent to the present motions, many of the critical facts are undisputed. In 1992 Marie A. Merkel ("Merkel"), now deceased, sought a divorce from Pollard. Pollard vacated the Beverly House at around that time. In 1996 the state court hearing the divorce case entered a final decree of divorce ("First Decree") and divided the community property. *See Pollard v. Merkel, 1999 Tex. App. LEXIS 975, 1999 WL 72209, at *1 (Tex. App. Feb. 12, 1999, no pet.)* (not designated for publication). Pollard appealed, and the court of appeals reversed, holding, *inter alia*, that the trial court had erroneously relied on a mediated settlement agreement between the parties. *See id.*

On remand, the case was tried to a jury, and in May 2001 the trial court entered another divorce decree ("Second Decree"), again dividing the community property. Shortly [*3] before the Second Decree was entered, Pollard deeded to Merkel his interest in the Beverly House. Pollard appealed the Second Decree and obtained another reversal, this time based on the trial court's failure to disqualify one of Merkel's attorneys. *See Pollard v. Merkel, 114 S.W.3d 695, 703 (Tex. App. 2003, pet. denied)* ("*Pollard II*"). Before the litigation could proceed on remand, Merkel died.

In the present case, the Estate sues the government--who has filed multiple liens against the Beverly

House based on Pollard's tax liabilities--and Pollard under *28 U.S.C. §§ 2201(a)* and *2410(a)* to quiet title. [1]The Estate contends that Pollard has no interest in the Beverly House because he and Merkel were legally divorced, and because Pollard deeded his interest in the property to Merkel. Pollard counterclaims for a declaratory judgment that he and Merkel were in fact married at the time of her death, that the deed is invalid, and that, as Merkel's surviving spouse, he owns a one-half community property interest in the Beverly House. Pollard also alleges that he is entitled to homestead rights in the property. The government, although recognizing that the validity of its tax liens depends [*4] on whether Pollard in fact has an interest in the Beverly House, does not take either side's position in their dispute.

II

The Estate maintains that the appeal and subsequent reversal of the First Decree applied only

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[1] *28 U.S.C. § 2410(a)(1)*:

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--(1) to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien.

to the division of marital property and did not affect the parties' marital status. It argues that Merkel and Pollard were divorced as of the date the First Decree was entered in 1996. The court disagrees.

"It is well settled in this State that the division of a marital estate is not a claim severable from the rest of a divorce proceeding." *Dawson-Austin v. Austin, 968 S.W.2d 319, 324 (Tex. 1998).* In reaching this conclusion, the Texas Supreme Court cited *Vautrain v. Vautrain, 646 S.W.2d 309 (Tex. App. 1983, writ dism'd)*, which involved the same question raised here. *See Dawson-Austin, 968 S.W.2d at 324.* In *Vautrain* the trial court--after having already entered a judgment of divorce--granted a partial new trial on the division of marital property. *See Vautrain, 646 S.W.2d at 310.* [*6] In doing so, it held that the earlier judgment of divorce was still final, and refused to consider any community property that was acquired after the judgment was entered. *Id. at 311.* The court of appeals reversed, holding that the parties were not legally divorced because the divorce decree could never have become final without a disposition of the property issues. *Id. at 316.* It explained that "[t]he issue of divorce is not severable from the issue of property division," and that the "portion of a divorce suit regarding property rights between the parties is a part of the very divorce suit itself." *Id. at 314* (emphasis removed). "The trial court may . . . separate some of the issues and grant a partial new trial on certain property issues, but if it does so, . . the order granting the divorce . . . is interlocutory and not final." *Id. at 315.*

Accordingly, because the trial court in that case had granted a partial new trial on the division of marital property, its judgment of divorce "was not final and [the parties] therefore could not [have been] legally divorced." *Id. at 316.*

These principles were applied in another case with similarities to this one. *See Garrison v. Tex. Commerce Bank, 560 S.W.2d 451 (Tex. Civ. App. 1977, writ ref'd n.r.e.).* [*7] *Garrison* involved a probate dispute between Barnett Garrison ("Barnett") and the Estate of Candace Garrison ("Candace"), of whom Barnett claimed to be a surviving spouse. *Id. at 452.* Relying on an order of divorce that was entered before Candace died, the probate court dismissed Barnett's claim against the Estate. *See id. at 452.* The court of civil appeals reversed, holding that, because the marital property had not yet been divided at the time of Candace's death, the divorce was never final and the parties were not divorced. *Id. at 457.* It explained that [HN3] a "cause of action for divorce terminates on the death of either spouse prior to the rendition of a judgment," and that such a judgment could never be final until "all issues" in the case have been disposed of (including the division of marital property). *Id. at 453-54; see also Whatley v. Bacon, 649 S.W.2d 297, 299 (Tex. 1983)* ("Death of a party abates a divorce action and its incidental inquiries of property rights and child custody."). It therefore concluded that Barnett had an interest in Candace's estate as her surviving spouse. *Id. at 457.*

It is therefore clear that Merkel and Pollard were not

legally divorced at the time of [*8] Merkel's death, because the marital property had not yet been divided.

III

The Estate argues next that Pollard deeded his interest in the Beverly House to Merkel. Pollard responds that he did this solely by reason of the Second Decree, which had not yet been reversed on appeal. He maintains that he is entitled to restitution of the deed.

The Restatement of Restitution provides that "[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final[.]" *Restatement (First) of Restitution § 74* (1937). "The Restatement's rule on restitution following reversal is supported by long-standing [Texas and] United States Supreme Court precedent." *Miga v. Jensen, 214 S.W.3d 81, 88 (Tex. App. 2006, pet. granted)* ("*Miga II*") (collecting cases).

The deed that Pollard executed effectively states, on its face, that its purpose is to comply with the Second Decree. *See* P. App. 126-29 (special warranty deed) (describing the "[c]onsideration" for the Beverly House transfer as "[t]he division [*9] of property in [the divorce action] . . . entered in the 256[th] District Court of Dallas County, Texas"). The record does not indicate another reason for Pollard

to transfer his interest in the Beverly House.

The Estate nevertheless opposes restitution on two grounds. First, it maintains that Pollard obtained various items of personal property as part of the property division. The proper remedy for this, however, is the restitution of the personal property to the rightful owner, not the abrogation of all restitution rights. *See Restatement (First) of Restitution § 74; Miga II, 214 S.W.3d at 88.*

Second, the Estate argues that Pollard transferred his interest in the Beverly House without a written court order that required that he do so. This fact is not controlling. "[A]s long as a judgment that is subsequently reversed is paid by the defeated party, the judgment does not have to be paid under some form of judicial compulsion for the party to be entitled to repayment." *Id. at 89.*[3]

For the foregoing reasons, the court concludes that Pollard is entitled to restitution of the deed he executed to the Beverly House in response to the

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[3] Texas law recognizes that, if a judgment debtor voluntarily pays an adverse judgment without being under *any* form of duress (e.g., the obligation to pay interest on judgment debt), and in a way that would [*10] cause the opposing party to believe that the controversy is over, the controversy becomes moot and the debtor waives his right *to appeal*. *See Miga v. Jensen, 96 S.W.3d 207, 211 (Tex. 2002).* There is no suggestion, however, that such a voluntary payment could also waive *restitution* rights where, as here, the debtor has successfully exercised a right to appeal (indicating that the case was not moot). *Cf. Pollard II, 114 S.W.3d at 703* (Pollard's successful appeal of Second Decree).

Second Decree.

IV

In view of the court's ruling, it can no longer be disputed that Pollard has a one-half community property interest in the Beverly House. *See, e.g., United States v. Stapf, 375 U.S. 118, 128, 84 S. Ct. 248, 11 L. Ed. 2d 195 (1963)* "Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate."). There is dispute, however, over whether Pollard still has homestead rights in the Beverly House after having vacated the property.

A

In Texas, "each [*11] spouse in a marriage [has] a separate and undivided possessory interest in the homestead [i.e., the Beverly House]." *E.g., United States v. Rodgers, 461 U.S. 677, 685, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983).* "A surviving spouse retains the right to use and occupy the homestead so long as he or she elects to do so . . . even if the decedent has willed the property to another." *Ferguson v. Ferguson, 111 S.W.3d 589, 597-98 (Tex. App. 2003, pet. denied)* (citing *Tex. Const. art. XVI, § 52; Tex. Prob. Code Ann. § 283* (Vernon 1980)). A person may waive his homestead right by abandoning it. *Id. at 598.* "Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead." *Womack v. Redden, 846*

*S.W.2d 5, 7 (Tex. App. 1992, writ denied).* "Abandonment is an affirmative defense." *McFarland v. Rousseau, 667 S.W.2d 929, 931 (Tex. App. 1984, no writ).* The "one asserting waiver must plead it and prove it by affirmative evidence." *Ferguson, 111 S.W.3d at 598.*

B

The Estate asserts that Pollard abandoned the homestead when he moved out of the Beverly House in 1992. It did not raise this defense in its answer to Pollard's amended counterclaim, [*12] but it has filed a motion for leave to amend its pleadings and do so.

Under the court's scheduling order, the deadline for filing a motion for leave to amend pleadings expired May 8, 2007. When the deadline for seeking leave to amend pleadings has expired, a court considering a motion to amend must first determine whether to modify the scheduling order under the *Fed. R. Civ. P. 16(b)(4)* good cause standard. *See S & W Enters., L.L.C. v. South Trust Bank of Ala., N.A., 315 F.3d 533, 536 (5th Cir. 2003); Am. Tourmaline Fields v. Int'l Paper Co., 1998 U.S. Dist. LEXIS 19756, 1998 WL 874825, at *1 (N.D. Tex. Dec. 7, 1998)* (Fitzwater, J.). If the movant satisfies the requirements of *Rule 16(b)(4)*, the court must next determine whether to grant leave to amend under the more liberal standard of *Rule 15(a)(2)*, which provides that "[t]he court should freely give leave when justice so requires." *Rule 15(a)(2); see S & W Enters., 315 F.3d at 536; Am. Tourmaline Fields,*

*1998 U.S. Dist. LEXIS 19756, 1998 WL 874825, at *1.*

The court assesses four factors when deciding whether to grant an untimely motion for leave to amend: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in [*13] allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *S & W Enters., 315 F.3d at 536* (internal quotation marks and brackets omitted). Applying these factors, the court grants the Estate's motion for leave to amend.

First, because Pollard did not assert his counterclaim until after the deadline for seeking leave to amend pleadings had expired (having obtained leave to do so), it would have been impossible for the Estate, prior to that deadline, to have sought leave to amend its pleadings to raise an affirmative defense to that counterclaim. Second, the amendment is important to the case because, without it, the Estate will be unable to challenge Pollard's assertion of homestead rights. Third, no unfair prejudice would result from the amendment. The Estate raised the abandonment defense in its summary judgment motion, and Pollard has had ample opportunity to respond. Pollard does not identify any unfair prejudice that would result from granting the Estate's motion for leave, and he argues instead that such a showing is not necessary. Although Pollard is correct that prejudice is not an absolute requirement, the absence of such prejudice certainly weighs [*14] in favor of granting leave. *See*

*id.*

Accordingly, all applicable[4] factors in the *Rule 16(b)(4)* analysis favor granting leave to amend. And because the court discerns no compelling reason for denying such leave under the more liberal standard of *Rule 15(a)(2)*, the motion for leave is granted.[5]

C

The Estate supports its abandonment defense by alleging, *inter alia*, that Pollard has not resided at the Beverly House since 1992 and has not paid property taxes or other [*15] expenses on the Beverly House at least since Merkel died in 2004. It also maintains that Pollard registered his car in New Mexico and intended to reside there. Pollard maintains, on the other hand, that he always intended to return to the Beverly House, stressing the fact that he continued to list the Beverly House as his primary residence for voter registration purposes.

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[4] Given the absence of prejudice, the court need not address the fourth factor: the availability of a continuance to cure such prejudice.

[5] In its motion for leave to amend, the Estate briefly argues that Pollard's amended answer and counterclaim is too vague to provide notice of any claim regarding the homestead interest. The Estate advances no persuasive argument in support of this challenge, however, and its position is undermined by its own summary judgment motion, which directly challenges the existence of Pollard's homestead interest and demonstrates clear notice of Pollard's claim. The court therefore declines to hold that Pollard's claim with respect to the homestead interest is foreclosed by the clarity of his pleadings.

Because the Estate will have the burden of proof of establishing this affirmative defense at trial, it may only obtain summary judgment if it establishes "'beyond peradventure all of the essential elements of the . . . defense.'" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am., 878 F. Supp. 943, 962 (N.D. Tex. 1995)* (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986)).* The court has noted that the "beyond peradventure" standard is "heavy." *See, e.g., Cont'l Cas. Co. v. St. Paul Fire & Marine Ins. Co., 2007 U.S. Dist. LEXIS 62105, 2007 WL 2403656, at *10 (N.D. Tex. Aug. 23, 2007)* (Fitzwater, J.). One of these elements is Pollard's intent to abandon the property. *Womack, 846 S.W.2d at 7.* Under the "heavy" "beyond peradventure" standard, the Estate has not met its burden of establishing that Pollard intended to [*16] abandon the homestead. The Estate has, however, adduced sufficient evidence to raise a fact issue. For this reason, Pollard's motion for summary judgment on the abandonment defense (or, more generally, on the existence of homestead rights) is also denied.

* * *

In sum, the court denies the Estate's December 21, 2007 motion for summary judgment. The court grants Pollard's December 14, 2007 summary judgment motion with respect to his request for declaratory judgment that he owns a one-half community property interest in the Beverly House, but it denies the motion with respect to his request for declaratory judgment that he has a continuing

homestead interest in the property. Pollard's January 28, 2008 and February 5, 2008 motions to strike are denied as moot; Pollard's February 5, 2008 motion for leave to supplement his pleadings is granted; the Estate's March 6, 2008 motion for leave to file an amended answer is granted; the government's February 20, 2008 withdrawal of disclaimer is allowed, and the concerns of the court's May 1, 2008 order have been satisfied.

SO ORDERED.

July 29, 2008.

/s/ Sidney A. Fitzwater

SIDNEY A. FITZWATER

CHIEF JUDGE

28 USCS § 2410

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this *title [28 USCS § 1444]* for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was

filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the

parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (*12 U.S.C. 1701k*), and subsection (d) of *section 1820 of title 38 of the United States Code*, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises. In any case where the United States is a bidder at the judicial sale, it may credit the amount determined to be due it against the amount it bids at such sales.

(d) In any case in which the United States redeems real property under this section or *section 7425 of the Internal Revenue Code of*

*1954* [1986] [*26 USCS § 7425*], the amount to be paid for such property shall be the sum of--

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that

the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer may issue a certificate releasing the property from such lien.